JOHN C. RANKIN, JR., PRINTER, 84 CORTLANDT ST. N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

GUILLAUME REUSENS,
Defendant in Error.

No. 980.

Brief on behalf of the Plaintiff in Error, on motion made by the Defendant in Error, for an order requiring further security, or to dismiss the Writ of Error herein.

Facts.

This was an action at law, commenced February 7, 1884, by attachment in the Supreme Court of the State of New York, and was removed to the Circuit Court of the United States on May 5, 1884, under the Act of 1875, at the instance of the plaintiff in error. Judgment was entered on August 12, 1885, for $28,062.86. On the 22d of August the Mexican National Construction Company sued out a writ of error to obtain a review of said judgment, which was at that time secured by

an undertaking previously given in the action and dated February 20, 1884, conditioned that the defendant (the Mexican National Construction Company) will, on demand, pay to the plaintiff (Reusens) the amount of any judgment which may be recovered in the action, not exceeding the sum of $29,000, *with interest;* the performance of the conditions whereof was guaranteed by the Fidelity and Casualty Company, a New York corporation, in pursuance of the provisions of an act of the Legislature of the State of New York, entitled, "An Act to facilitate the giving of bonds required "by law," passed June 13, 1881.

This undertaking is to pay a sum larger than the judgment itself, and to pay such sum with *interest.*

In addition to this security the Circuit Judge required, and the plaintiff in error furnished, a bond for damages and costs in the sum of $5,000; the Circuit Judge personally examined the sureties, and thereafter approved the bond and signed the citation.

The undertaking of February 20, which secured the judgment had been given on an application to the Supreme Court of New York to discharge the attachment whereby the action was commenced, and had been objected to, on the ground, among others, that two sureties were required; the objection had been overruled, and the guarantor company justified through its president, who was examined on oath on behalf of the defendant in error, and whose examination was reduced to writing and annexed to the undertaking, which was then approved by a Judge of the New York Supreme Court, and the property attached was released.

Reusens never took any step to obtain a review by appeal or otherwise of this ruling, determination or approval.

After his time to appeal had *expired*, the case was removed; after the removal, Reusens did not take any steps in the Federal Court to obtain a review of the determination of the Judge of the Su-

preme Court of this State, or for further or other security, although the removal was perfected in May, 1884, and a verdict was not rendered till June, 1885, and judgment was not entered thereon until August 12, 1885.

POINTS.

First.

There is no pretence that the acceptance of the security was obtained by fraud, or that since its acceptance circumstances have changed, so that the security which was then good and sufficient, does not continue to be so.

But it is claimed that the security accepted or approved, was insufficient in amount; while not conceding that the defendant in error is entitled to have the action of the Circuit Judge in that be half reviewed here on his present showing, we say the claim is groundless.

I.—To sustain his position the defendant in error attempts to impeach the undertaking given on discharging the attachment, and in support thereof cites the case of Nichols against MacLean, 98 N. Y., 458; but an examination of that decision will show that it has no application to this case; all the Court decided in that case, was that upon an appeal to the Court of Appeals of the State of New York, the appellee had a right to insist that the appellant should give an undertaking with two sureties, as required by section 1334 of the Code. The decision is based upon the ground that inasmuch as *such* an undertaking does not require approval by a judge or officer, and is not one whose sufficiency is made to depend upon the approval of a judge or officer, Chapter 486 of the Laws

of New York for 1881, was not, as to an undertaking on appeal to the Court of Appeals, inconsistent with, and did not repeal, said section 1334. It cannot be deduced from this decision, that such an undertaking is not perfectly good and valid, and affords ample security, nor that sections *other* than 1334 of the Code are not inconsistent with Chapter 486, and repealed or modified thereby. For instance:

SECTION 687 gives a defendant the right to apply for an order to discharge an attachment issued in the action.

SECT. 688 requires that upon such an application the defendant must give an undertaking with at least two sufficient sureties.

SECT. 690 provides that a plaintiff may except to the sufficiency of the sureties, and that thereupon the sureties must justify, or *a new undertaking* be given with new sureties, who must justify in like manner as bail upon arrest.

SECT. 580 requires bail upon arrest to attend before a Judge to be examined on oath, on the part of the plaintiff, touching his sufficiency, *in such manner as the Judge in his discretion thinks proper*, and if required by the plaintiff's attorney the examination must be reduced to writing.

SECT. 581 requires that if the Judge finds the bail sufficient, he must annex the examination to the undertaking and endorse his allowance thereon.

It is obvious, therefore, that an undertaking given on an application to discharge an attachment (if excepted to, as it was in this case), *requires approval by a Judge*, and is one "whose sufficiency is made to depend upon the approval of a Judge," and comes directly within the provisions of the first section of Chapter 486, Laws of New York, 1881, page 659, which is cited at length on page 3 of the

brief on behalf of the defendant in error; and this law having been passed after the Code was enacted, operates to modify or repeal the latter so far as to enable the Judge, in his discretion in such case, to accept in lieu of two sureties, just such an undertaking and guarantee as was given in this case.

That such was the intent of the legislature is apparent from the title: "An Act to facilitate the giving of bonds required by law"; and that it is universally so regarded is evident from the rule of the Supreme Court of the State of New York, adopted after the passage of said act, which rule is at length set forth on page 4 of the defendant's brief. And this construction seems entirely in accord with § 579 of the Code, whereby a Judge was authorized to accept bail if the sureties jointly justified to the requisite amount.

II.—The defendant in error, to further support his claim, asserts that "No method is provided in "the New York Code by which the sufficiency of "the undertaking of the Fidelity Company could "be presented to the Court of Appeals; and even "if there had been any way of presenting the "question to that Court, this case was removed by "the plaintiff in error to the United States Circuit "Court before such question could have been dis-"posed of."

The first part of this assertion, we believe, cannot be sustained upon authority, for any order affecting a substantial right is appealable to the Court of Appeals (Civil Code, sect. 190, sub-division 2); and it has been held by the Court of Appeals of the State of New York, in the case of Wright *vs.* Rowland, 4 Keys, 165; 4 Abb. Ct. App., Dec., 649, *that an order discharging an attachment affected a substantial right.* As to the latter part of the assertion the Court will recollect that the case was removed only *after* the time to

appeal had *expired*, and that the remedy by appeal to review the determination of the Supreme Court had been lost, or waived, by the defendant in error.

III.—The very objection which is here urged against the validity of this undertaking and guarantee, was presented to the Supreme Court of the State of New York at the time the undertaking was offered and *overruled*. No steps were taken to obtain a review of this decision. The matter involved is, therefore, as between the plaintiff and the defendant, "*res judicata*," and cannot now be reopened.

IV.—But whether this undertaking satisfied the requirements of the code, is not material in determining the liability of the surety thereon in New York.

The fact that the property attached, was released upon the strength of this undertaking, is a sufficient consideration to support the undertaking, and render liable the guarantor.

Post *vs.* Doremus, 60 N. Y., 376 (1875).
Goodwin *vs.* Bunzl, 18 Jones & Spencer, 441.
Dunseith *vs.* Linke, 10 Daly, 363.

And it may be enforced as an agreement between the parties.

Toles *vs.* Adee, 84 N. Y., 222 (1881).

Very clearly therefore the judgment in the Court below, was in the true and obvious sense of rule 29, "*otherwise secured*" to the extent of the undertaking given on the discharge of the attachment, and when the Court below, in the proper exercise of its discretion required as a condition of granting the supersedeas the additional bond of $5,000, it fully satisfied the requirements of that rule, and gave to

the defendant in error all the indemnity to which it entitled him.

Second.

It was held by the Court of Appeals of the State of New York, that an attachment issued under the Code is to meet the *ultimate* recovery in the action, *not merely the first* judgment. Wright *vs.* Rowland, *supra.*

The undertaking took the place of the property attached, the claim in controversy was therefore *secured*, and when it ripened into a judgment the satisfaction of that judgment was secured.

The 29th Rule provides that in all cases of judgments for the recovery of money, "*not otherwise* secured, the indemnity must be for the whole amount, interest, costs." &c. It is submitted that the judgment in this case being secured by the attachment of property, and later by the undertaking which was substituted for the property attached, does not come within that part of the rule which requires indemnity for the whole amount, but is one of those cases wherein the rule requires indemnity only in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit, and just damages for delay, costs and interest.

In actions which, like the one at bar, are brought in the Courts of a State against a corporation created under the laws of another State, and commenced by attachment, the property attached becomes the subject of the controversy, and the proceeding is in its nature one "in rem," and when, as in this case, an undertaking is substituted for the *res*, "a bond for the value thereof is in the custody or control of the Court;" and we have a case within the very words of the rule.

But it is contended that these words should be construed to apply only to cases where the bond had been given for the value of property in the custody or control of the United States Circuit Court, and further only to such of these cases wherein the bond had been given to release property or proceeds of property seized under admiralty process.

We contend for a broader and more equitable construction.

The principle of the rule, is that a litigant shall not be compelled to give double security, and we can see no reason why it does not apply with equal force to actions at law, as well as to admiralty cases, to cases removed to the Circuit Court as well as to cases brought there by original process or appeal.

The language of the rule is broad enough to cover them all, and we contend for our construction with the more confidence, as on the revision of the rules in 1884, after the passage of the act of Congress of June 1st, 1872, 17 U. S. Stat. p. 196, and of the act of March 3rd, 1875, 18 U. S. Stat., p. 470, this rule was *readopted without change.*

It would seem that any different construction is repugnant to the Act of Congress of March 3d, 1875. which provides that after removal "the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court."

It cannot be seriously contended that the fact that the undertaking was given while the cause was in the State Court, makes any difference, or that because of that fact the United States Court had any the less control over it; the proposition implies necessarily that the removal impairs the undertaking, and cannot therefore be sustained in view of the Act of Congress of March 3d, 1875. (18 U. S. Stat. at L. p. 470,) Section four whereof provides:

"That when any suit shall be removed from a State Court to a Circuit Court of the United States,

any attachment * * * of the goods or estate of the defendant had in such suit in the State Court shall hold the goods or estate so attached * * * * to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the Court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal, shall remain valid and effectual, notwithstanding said removal."

So that by the express provision of the statute the removal *preserved* the undertaking given on the discharge of the attachment, and *carried it with the* action into the Circuit Court.

Third.

All that the statutes and the rules require is, that the security shall be good and sufficient.

There is nothing in either the statutes or the rules which prevents any Justice or Judge signing a citation on any writ of error, to accept a company, such as the Fidelity Company, as security upon the bond. The undertaking which the defendant in error now seeks to impeach was part of the record in the Court below, and its sufficiency and validity was never questioned during the fifteen months that the case was pending in the Circuit Court.

These facts were proper for the consideration of the Circuit Judge when he determined upon the amount of the security necessary to indemnify the defendant in error on this writ; and this Court in

Jerome *vs.* McCarter, 21 Wallace, 17,

held in substance: that in the absence of fraud, the action of the Justice or Judge in accepting the

security within the statute and within the rules of this Court, adopted for his guidance, was final, so far as it depended on the facts existing at the time the security was accepted.

This ruling was reaffirmed in

Martin *vs.* Hazard Powder Co., 93 U. S., 302.
Ex parte French, 100 U. S., 1.
Draper *vs.* Davis, 102 U. S., 370.
Williams *vs.* Claflin, 103 U. S., 753.

Not only has the defendant in error never assailed the undertaking of the Fidelity Company in the Court below, but he has even now failed to show any *change* of circumstances, and he makes no claim that the bond for $5,000 is not good.

And not only has this Court held that the action of the Judge below is conclusive, but there is no provision of law to warrant the exercise by this Court of the extraordinary powers which it is asked to exercise in this case upon such slender showing.

Fourth.

The motion for further security should be denied with costs, and under no circumstances can the writ of error be dismissed.

THEODORE F. H. MEYER,
Att'y for the Plaintiff in Error.

JOS. H. CHOATE,
Of Counsel.

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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

GUILLAUME REUSENS,
Defendant in Error.

Brief on behalf of the Defendant in Error on motion to compel Plaintiff in Error to furnish additional security.

STATEMENT OF FACTS.

This action was commenced in the Supreme Court of the State of New York, in February, 1884, by the defendant in error against the plaintiff in error, to recover a sum of money only, to wit, the sum of twenty-five thousand dollars, as for money had and received by the plaintiff in error to the use of the defendant in error.

Thereafter and on or about the 6th day of February, 1884, the defendant in error obtained a warrant of attachment in due form of law against the property of the plaintiff in error, in said action in said Supreme Court, pursuant to the Code of Civil Procedure of the State of New York; said attach-

ment was duly served by the Sheriff of the City and County of New York, and the sum of thirty thousand dollars then on deposit in the American Exchange National Bank in said city, to the credit of said plaintiff in error, was duly levied on by said Sheriff to secure said claim, interest and costs.

On or about the 11th day of February, 1884, said plaintiff in error duly appeared in said action by Theodore F. H. Meyer as its attorney.

On or about the 20th day of February, 1884, the said plaintiff in error served an undertaking, for the purpose of discharging said attachment, pursuant to sections 687 and 688 of the Code of Civil Procedure of the State of New York.

Section 687 of said Code is as follows: "The "defendant may, at any time after he has appeared "in the action, and before final judgment, apply "to the Judge who granted the warrant, or to the "Court, for an order to discharge the attachment "as to the whole or a part of the property at- "tached."

Section 688 of said Code is as follows: "Upon "such application the defendant *must* give an "undertaking with *at least two sufficient sureties*, "to the effect that he will, on demand, pay to the "plaintiff the amount of any judgment, which "may be recovered in the action against him, not "exceeding a sum specified in the undertaking "with interest. The sum so specified must be at "least equal to the amount of the plaintiff's de- "mand, as specified in his affidavit; or at the op- "tion of the defendant, equal to the appraised "value, according to the inventory of the property "attached, or if the application is to discharge the "attachment, as to a part only of the property "attached, to the appraised value of that por- "tion."

The undertaking given by the plaintiff in error in this case was not an undertaking with two sureties as provided in section 688 of the New York Code, but was one executed by the Fidelity and

Casualty Company of New York, pursuant to the provisions of an Act of the Legislature of the State of New York, passed June 13th, 1881, being Chapter 486 of the Laws of 1881, entitled "An Act to facilitate the giving of bonds required by law."

Section one of this act provides as follows:

"Whenever any person who now or hereafter "may be required or permitted by law to make, "execute, and give a bond or undertaking with se "curity conditioned for the faithful performance "of any duty or for the duty or not doing of any- "thing in said bond or undertaking specified, any "head of department, surrogate, judge, sheriff, "district attorney, or any other officer who is now "or shall hereafter be required to approve the suf- "ficiency of any such bond or undertaking, may, "in the discretion of such officer, accept such bond "or undertaking, and approve the same, whenever "the conditions of such bond or undertaking are "guaranteed by a company duly organized or au- "thorized to do business under the laws of this "State, and authorized to guaranty the fidelity of "persons holding positions of public and private "trust, and all such corporations are hereby vested "with full power and authority to guarantee such "bonds and undertakings. But this act shall not "prevent a justification on the part of such com- "pany through its officers, as required by law or "other sureties."

A copy of this undertaking is annexed to the motion papers, and marked Schedule "A."

It was allowed by one of the Justices of the Supreme Court of the State of New York, against the protest and objection of the plaintiff in error on or about the 23d day of February, 1884.

The Fidelity & Casualty Company of New York, that gave this undertaking, did so under a special rule of the Supreme Court of the State of New York, adopted by said Court after the passage of the above Act of 1881.

The rule is as follows:

"The Fidelity & Casualty Company of New "York, is hereby designated as a company duly "authorized and empowered by an Act of the "Legislature of the State of New York, entitled "'An Act to facilitate the giving of bonds required "by law,' passed June 13th, 1881, to guarantee all "bonds and undertakings required or permitted "by law, conditioned for the faithful performance "of any duty, or for the doing or not doing of "anything in said bond or undertaking specified; "and any Justice of this Court is authorized in his "discretion, to accept and approve of the sufficiency "of any bond or undertaking in any suit or action "in this Court or in any proceeding, except in "criminal cases, in which by law it is provided "that any bond or undertaking shall be accepted "or approved by any Justice of this Court, when-"ever such bond or undertaking is conditioned for "the faithful performance of any duty, or the do-"ing or not doing of anything in such bond or un-"dertaking specified, and the performance of the "conditions thereof, is guaranteed by the Fidelity "& Casualty Company of New York, or the same "is executed by said company as surety; subject "however, to the requirement by said Justice of a "justification by such company, as such surety, "through its president or secretary, in the same "manner as is required by law of other sureties. "The secretary of said company shall transmit to "the Justices holding the First General Term in "the First Department, in each year, a statement "under oath, showing its financial condition on "the 31st day of December preceding said state-"ment."

Thereafter a general demurrer to the complaint of the plaintiff in error, was interposed by the defendant in error, and when the issues of law, raised thereby, were upon the day calendar of said Supreme Court for trial, the case was removed into the Circuit Court of the United States for the Southern

District of New York upon the petition of the plaintiff in error.

On or about the 1st day of December, 1884, an argument was had upon the demurrer before the Circuit Judge, and he rendered a decision in favor of the defendant in error upon said demurrer, but granted leave to the plaintiff in error to answer the said complaint.

See

Reusens *vs.* The Mexican National Construction Company, 22 Federal Reporter, 522.

Thereafter the plaintiff in error answered the complaint, and on or about June 3d, 1885, the action was tried before the Honorable Hoyt H. Wheeler, sitting as Circuit Judge, and a jury, and a verdict was rendered in favor of the defendant in error and against the plaintiff in error for the sum of $27,708.05, and on or about August 12th, 1885, judgment was entered against the plaintiff in error for the sum of $28.062.86, and notice thereof was on that day duly served upon the attorney for the plaintiff in error.

On or about the 22d day of August, 1885, a writ of error was allowed by the Honorable William J. Wallace, Circuit Judge, and a citation was issued thereupon to the defendant in error returnable on the second Monday of October, 1885.

This action is now upon the docket of this Honorable Court by the number 980.

Upon allowing the writ of error, a bond, as security to the defendant in error, was approved by the Circuit Judge, a copy of which is annexed to the motion papers, marked "Schedule B."

Said writ of error was allowed, and said bond was approved without any notice whatever to the defendant in error, or his attorneys or counsel.

The bond given by the plaintiff in error at the time the writ of error was allowed is a bond with

two sureties in the sum of only five thousand dollars.

POINTS.

First.

This was an action at law and the judgment is for a sum of money only, viz., for $28,062.86, entered August 12th, 1885.

Under the 29th rule of this Court, promulgated December Term, 1867 (6 Wallace, V.), the defendant in error was therefore entitled to indemnity upon the writ of error.

"Such indemnity, where the judgment or decree "is for the recovery of money, not otherwise se-"cured, must be for the whole amount of the judg-"ment or decree, including 'just damages for de-"'lay,' and costs, and interest on the appeal."

This was the uniform practice prior to the adoption of the rule.

See

Catlett *vs.* Brodie, 9 Wheaton, 553.
Jerome *vs.* McCarter, 21 Wallace, 17.

The judgment in this action is "for the recovery "of money not otherwise secured."

It is true that the plaintiff in error will claim that the undertaking guaranteed by the Fidelity Company, makes this judgment "otherwise secured."

This claim is not well founded, for section 688 of the Code of Civil Procedure of the State of New York expressly requires that when the defendant seeks to discharge an attachment by giving an undertaking, such undertaking must be one with "*at least two sufficient sureties.*"

At the time when the undertaking guaranteed by the Fidelity Company was given in this case, the Court of Appeals of the State of New York had not

decided whether, where an undertaking was required to be given with two sureties, an undertaking guaranteed by the Fidelity Company was a sufficient substitute therefor.

The Court of Appeals has now decided the question and has distinctly held that chapter 486 of the Laws of 1881, "to facilitate the giving of bonds required by law," does not repeal or affect the provisions of the Code of Civil Procedure in cases where two sureties are required to an undertaking.

See

Nichols *vs.* MacLean, 98 N. Y., 458.

This case was decided by the Court of Appeals March 10, 1885. The appellant therein had given an undertaking guaranteed by this same Fidelity Company as a substitute for the two sureties required under section 1334 of the Code, and the Court of Appeals distinctly held that this could not be done.

Section 1334 of the Code provides that each undertaking given as prescribed in this title must be executed by at least two sufficient sureties.

Mr. Justice Rapallo delivering the opinion of the Court of Appeals, says:

"The Code of Civil Procedure (section 1334) re-
"quires that an undertaking on appeal to this
"Court be executed by at least two sureties. The
"appellant cannot himself sign as a surety. (Morss
" *vs.* Hasbrouck, 10 Abb., N. C., 407.)

"The Act of 1881 (chap. 486) does not repeal sec-
"tion 1334, of the Code, and is not inconsistent
"with it. That act applies only to bonds or un-
"dertakings which are to be accepted or approved
"by a head of department, Surrogate, Judge,
"Sheriff, District Attorney, or other officer, and it
"merely authorizes any officer who is required to
"approve any such bond or undertaking, to ac-
"cept and approve the same, in his discretion, when

"its conditions are guaranteed by a duly incor-
"porated guaranty company.

"The undertaking on appeal in this case is not
"one whose sufficiency is made to depend upon
"the approval of any Judge or officer. On the
"contrary, it does not even require approval
"(Code, sec. 1335), and the approval of a Judge
"cannot be substituted for the two sureties re-
"quired by law. If it could, then the Act of 1881
"would be applicable and would authorize the
"Judge to give the approval; but there is no law
"which declares either the approval of a judge or
"the guaranty by a corporation, equivalent to two
"sureties. We therefore, conclude that the un-
"dertaking before us, being executed only by the
"appellant and the Fidelity and Casualty Company,
"with no other security, is insufficient."

Precisely this doctrine is applicable here. The undertaking required by section 688 of the New York Code, is not one whose sufficiency is made to depend upon the approval of any Judge or officer, but one executed by "*at least two sufficient* "*sureties.*"

It is apparent, therefore, that the undertaking upon which the defendant in error is forced to rely for his security is an undertaking which the Court of Appeals would itself pronounce bad if the question as to the sufficiency thereof could be presented to it.

No method is provided in the New York Code by which the sufficiency of the undertaking of the Fidelity Company could be presented to the Court of Appeals; and even if there had been any way of presenting the question to that Court, this case was removed by the plaintiff in error to the United States Circuit Court before such question could have been disposed of.

Therefore, the defendant in error submits that with a money judgment of $28,062.86, he has only an undertaking in the sum of $5,000, while he is

under the rule entitled to full indemnity for the whole amount of his judgment.

The only remedy the defendant in error now has, is by application to this Court, for he had no opportunity to be heard when Judge Wallace fixed the amount of the new undertaking given upon the writ of error herein.

Second.

This 29th Rule also provides that "in all suits "where the property in controversy necessarily "follows the event of the suit, as in real actions, "replevin, and in suits on mortgages; or where "the property is in the custody of the Marshal, "under admiralty process, as in case of capture or "seizure; or where the proceeds thereof, or a bond "for the value thereof, is in the custody or control "of the Court, indemnity in all such cases is only "required in an amount sufficient to secure the "sum recovered for the use and detention of the "property and the costs of the suit, and 'just "damages for delay,' and costs and interest on "the appeal."

It is apprehended that the plaintiff in error will now claim, and ~~demanded~~ claimed before Judge Wallace, upon the granting of the writ of error herein, that the undertaking guaranteed by the Fidelity & Casualty Company rendered unnecessary the giving of any other undertaking than the one for five thousand dollars.

The claim is, however, clearly not well founded.

(*a.*) It may be claimed that the latter part of the 29th rule provides for three distinct classes of cases, viz.:

(1.) "Where the property in controversy ne-

"cessarily follows the event of the suit, as in "real actions, replevin and in suits on mort- "gages.

(2.) "Where the property is in the custody of "the Marshal under admiralty process, as "in case of capture or seizure.

(3.) "Where the proceeds thereof (*i. e.*, the "property), or a bond for the value thereof, "is in the custody or control of the Court."

Clearly this is not embraced within either of the first two subdivisions of this rule.

It is not a real action, replevin or suit on mortgage; and it is not a case in admiralty.

It can only be argued by plaintiff in error, that it is a case under the third subdivision of the rule.

But assuredly such argument can not prevail; for it is not a case where the proceeds of property, or a bond for its value, was in the custody or control of the United States Circuit Court.

This undertaking of the Fidelity Company was not taken in or under the direction of the United States Court. It is not an undertaking for the value of property in the custody or control of that Court.

(*b.*) It may be well doubted whether those who wrote this 29th rule ever intended the third subdivision to refer to anything other than cases under admiralty process; for the third subdivision of this rule is well satisfied by limiting the meaning of the words "proceeds thereof," to proceeds of property sold under such process; and the words "a bond for the value thereof" to the bond given by the respondent, when his property has been seized under a libel.

This construction is indeed all the more natural and reasonable when it is remembered that this 29th rule in its present form was promulgated in 1867, five years prior to the passage of the Act of

Congress of June 1st, 1872 (17 U. S. Stat. at Large, p. 196), in the sixth section whereof express power was, for the first time, conferred upon the Circuit and District Courts to issue attachments when allowed by the laws of the different States.

See

United States *vs.* Stevenson, 1 Abbott's U. S. R., 495.

Fairly then, it may be claimed that no such case as the present was contemplated, when the rule under consideration was promulgated.

Third.

Even, therefore, if this Court would hold, in case a proper undertaking had been given by the plaintiff in error pursuant to section 688 of the New York Code, that it might have been considered by the Circuit Judge under the 29th rule of this Court, still as such undertaking was, as has now been decided by the Court of Appeals, no compliance with said section 688 of the Code, this Court should dismiss the writ of error herein, unless the plaintiff in error furnishes within a time to be fixed by this Court, indemnity for the whole "amount of the "judgment * * including just damages for de- "lay, and costs and interest on the appeal."

MICHAEL H. CARDOZO,
Of Counsel for Defendant in Error.

118-47

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1885.

No. 980.

THE MEXICAN NATIONAL CONSTRUCTION CO.,

Plaintiff in Error,

versus

GUILLAUME REUSENS,

Defendant in Error.

Affidavit and Notice of Motion to require Plaintiff in error to furnish additional security.

BILLINGS & CARDOZO,

Attorneys for Defendant in Error,

No. 170 Broadway,

NEW YORK.

MICHAEL H. CARDOZO,

of Counsel.

NEW YORK:

C. S. NATHAN, 55 Cedar Street.

1886.

SUPREME COURT

OF THE UNITED STATES.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error,

against

GUILLAUME REUSENS,
Defendant in Error.

Take notice that upon the annexed affidavit of Michael H. Cardozo, verified the 20th day of March, 1886, we shall move this Honorable Court on Monday the 12th day of April, 1886, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order requiring the Mexican National Construction Company, the plaintiff in error, to give such other or further security to the defendant in error for the payment of the judgment entered herein in favor of said defendant in error as is required by the rules and practice of this Court, and that if said plaintiff in error shall fail to give such security that the writ of error herein be dismissed, and for such other or further relief in the premises as to the Court shall seem proper.

Dated, NEW YORK, March 20, 1886.

Yours, etc.,

BILLINGS & CARDOZO,
Attorneys for Defendant in Error,
No. 170 Broadway,
New York.

To

THEODORE F. H. MEYER, Esq.,
Attorney for Plaintiff in Error,
No. 32 Nassau Street,
New York.

5 SUPREME COURT OF THE UNITED STATES.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error.

against

GUILLAUME REUSENS,
6 Defendant in Error.

STATE OF NEW YORK,
Southern District of New York, } ss.:

Michael H. Cardozo, being duly sworn, doth depose and say: I am one of the attorneys and of counsel for the defendant in error, and have had continuous charge of this action for him as such
7 attorney and counsel from its commencement.

On or about the 6th day of February, 1884, Guillaume Reusens, the defendant in error, commenced an action at law in the Supreme Court of the State of New York, in and for the City and County of New York, against the Mexican National Construction Company, the plaintiff in error, to recover a sum of money only, to wit, the sum of $25,000 and interest, as for money had and received by the plaintiff in error to the use
8 of the defendant in error.

Thereafter, and on or about the said 6th day of February, 1884, the said defendant in error obtained a warrant of attachment in due form of law against the property of the said plaintiff in error, in said action in said Supreme Court, pursuant to the Code of Civil Procedure of the State of New York; said attachment was duly served by the Sheriff of the City and County of

New York, and the sum of $30,000 then on deposit in the American Exchange National Bank, in said city, to the credit of said plaintiff in error, was duly levied on by said Sheriff to secure said claim, interest and costs. 9

On or about the 11th day of February, 1884, said plaintiff in error duly appeared in said action by Theodore F. H. Meyer, as its attorney.

On or about the 20th day of February, 1884, the said plaintiff in error served an undertaking for the purpose of discharging said attachment, pursuant to sections 687 and 688 of the Code of Civil Procedure of the State of New York. 10

Said undertaking was executed and delivered by the Fidelity and Casualty Company, of New York, in said undertaking mentioned, pursuant to the provisions of an Act of the Legislature of the State of New York, passed June 13th, 1881, being Chapter 486 of the Laws of 1881, entitled "An act to facilitate the giving of bonds required by law." 11

A copy of said undertaking is hereto annexed and marked Schedule "A."

Said undertaking was allowed by one of the Justices of said Supreme Court against the protest and objection of deponent on or about the 23rd day of February, 1884.

The Fidelity and Casualty Company of New York gave said undertaking in pursuance of the following rule, adopted by the Supreme Court of the State of New York, subsequent to the passage of the aforesaid Act of 1881: "Rule—The Fidelity and Casualty Company of New York is hereby designated as a Company duly authorized and empowered by an act of the Legislature of the State of New York, entitled 'An Act to facilitate the giving of bonds required by law,' passed June 13th 1881, to guarantee all 12

13 bonds and undertakings required or permitted by law, conditioned for the faithful performance of any duty, or for the doing or not doing of anything in said bond or undertaking specified; and any Justice of this Court is authorized in his discretion to accept and approve of the sufficiency of any bond or undertaking in any suit or action in this Court, or in any proceeding, except in criminal cases, in which by law it is provided that any bond or undertaking shall be accepted
14 or approved by any Justice of this Court, whenever such bond or undertaking is conditioned for the faithful performance of any duty, or the doing or not doing of anything in such bond or undertaking specified, and the performance of the conditions thereof is guaranteed by the Fidelity and Casualty Company of New York or the same is executed by said company as surety, subject, however, to the requirement by said Justice of a justification by such company, as such surety,
15 through its President or Secretary, in the same manner as is required by law of other sureties. The Secretary of said Company shall transmit to the Justices holding the first General Term in the First Department, in each year, a statement under oath, showing its financial condition on the 31st day of December preceeding said statement.

On or about the 25th day of February, 1884, the complaint was duly served in said action; and,
16 on or about the 28th day of April, 1884, issue was joined by the service of a general demurrer on behalf of said plaintiff in error.

The issues of law raised by said demurrer were upon the day calander of said Supreme Court on or about the 5th day of May, 1884, for trial.

On said 5th day of May, 1884, upon the petition of said plaintiff in error, said action was removed

to the Circuit Court of the United States for the Southern District of New York. 17

On or about the 1st day of December, 1884, said action came on for trial before the Honorable William J. Wallace, Circuit Judge, upon said demurrer, and was duly tried; and thereafter a decision was duly rendered in favor of said defendant in error upon said demurrer, but granting leave to said plaintiff in error to answer said complaint.

In the month of January, 1885, said plaintiff in 18
error duly served an answer to said complaint.

On or about the third day of June, 1885, said cause was duly called for trial before the Honorable Hoyt H. Wheeler, sitting as Circuit Judge, and a jury, and the issues of fact and law were duly tried; and thereupon a verdict was duly rendered by direction of the Court in favor of said defendant in error and against said plaintiff in error for the sum of $27,708.05. 19

On or about the 12th day of August, 1885, judgment was duly entered against the said plaintiff in error for the sum of $28,062.86; and notice thereof was on that day duly served upon the said attorney for said plaintiff in error.

On or about the 22nd day of August, 1885, a writ of error was allowed by the Honorable William J. Wallace, Circuit Judge, and a citation was thereupon issued, directed to said defendant 20
in error, returnable the second Monday in October, 1885. This cause is now upon the docket of this Court, numbered 980.

Upon allowing the aforesaid writ of error, a bond, as security to the said defendant in error, of which a copy is hereto annexed, marked Schedule B, was approved by the Honorable William J. Wallace, Circuit Judge.

21 The said writ of error was allowed and said bond approved without any notice whatever to the said defendant in error or his attorneys or counsel.

MICHAEL H. CARDOZO.

Subscribed and sworn to before me this 20th day of March, 1886.

EDGAR J. NATHAN.

22 [SEAL.] *Notary Public, in and for the* City and County of New York.

SCHEDULE "A."

23 SUPREME COURT.

CITY AND COUNTY OF NEW YORK.

GUILLAUME REUSENS

vs.

THE MEXICAN NATIONAL CONSRTUCTION COMPANY.

24

Undertaking on discharging attachment.

An attachment having been issued in the above action to the Sheriff of the City and County of New York, and the defendant having appeared in such action, and having applied to a Justice of this Court for an order to discharge the same: Now, The Mexican National Construction Com-

pany, a corporation duly organized and existing 25
under the laws of the State of Colorado, hereby undertakes, pursuant to the statute in such case made and provided, in the sum of twenty-nine thousand dollars, that the defendant will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against the defendant, not exceeding the above mentioned sum, with interest.

Dated, New York, February 20, 1884.

26

THE MEXICAN NATIONAL CONSTRUCTION COMPANY.

[L. S.] By WALTER HINCHMAN,
President.

Attest—GEORGE BERNARD,
Assist. Secretary

In the presence of
THEO. H. FRIEND.

27

STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Be it remembered, that on this 20th day of February, 1884, before me personally came Walter Hinchman and George Bernard, severally to me known and kown to me to be the President and Assistant Secretary respectively of the Mexican National Construction Company, and the 28
same persons who severally subscribed the foregoing instrument as such President and Assistant Secretary respectively.

And the said Walter Hinchman, being by me duly affirmed and the said George Bernard being by me duly sworn, did depose and say, and each for himself said that they severally reside at the City of New York: that he, the said Hinchman,

is the President, and he, the said Bernard, is the Assistant Secretary of said company; that they severally know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed thereto by authority of the Board of Directors of said company; and they severally, in due form of law, acknowle lg ed to me that they had signed, sealed and executed the said instrument for and on behalf of said company, by authority of its Board of Directors, as its free and voluntary act and deed, for the uses and puposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 20th day of Februruary, A. D. 1884.

THEO. H. FRIEND.

Notary Public.

In and for the City and County of New York.

SUPREME COURT.

CITY AND COUNTY OF NEW YORK.

GUILLAUME REUSENS

vs.

THE MEXICAN MATIONAL CONSTRUCTION COMPANY.

In pursuance of the provision of an Act of the Legislature of the State of New York, entitled "An Act to facilitate the giving of bonds re-

quired by law," passed June 13th, 1881, The 33
Fidelity and Casualty Company of New York, in consideration of one dollar to it in hand paid, the receipt whereof is hereby acknowledged, hereby guarantees the performance of the covenants and conditions of the within undertaking.

In witness whereof, the said Fidelity and Casualty Company of New York has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of its President and Secretary. 34

WM. M. RICHARDS, President.

ROBT. J. HILLAS, Ass't Sec'y.

CITY AND COUNTY OF NEW YORK, *ss.:*

On this 20th day of February, 1884, before me personally appeared William M. Richards, to me 35
known, who being by me duly sworn, did depose and say that he resides in the City of Brooklyn, N. Y.; that he is the President of the Fidelity and Casualty Company of New York, the corporation described in and which executed the foregoing instrument: that he knows the corporate seal of said company; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said company, and that he signed said instrument as 36
President of said company, by like authority, and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 486, of the Session Laws of 1881.

JAMES C. MENAIR,

Notary Public,
New York Co.

(Notary)
(Seal.)

37 **"SCHEDULE B"**

CIRCUIT COURT OF THE UNITED STATES OF AMERICA.

FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

GUILLAUME REUSENS

38 *vs.*

THE MEXICAN NATIONAL CONSTRUCTION COMPANY.

Bond for Damages and costs

Know all men, by these presents, that we, The Mexican National Construction Company, as principal, and William M. Spackman and John D. Probst, as sureties, are held and firmly bound
39 unto the above named Gillaume Reusens in the sum of five thousand (5,000) dollars, to be paid to the said Guillaume Reusens for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly, by these presents.

Sealed with our seals and dated the 22d day of August in the year of our Lord one thousand eight hundred and eighty-five.

40 Whereas, the above named, The Mexican National Construction Company has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the Circuit Court of the United States, for the Southern District of New York: Now, therefore, the condition of this obligation is such that if the above named, The Mexican National Construction Company, shall prose-

cute said writt of error to effect and answer all 41
damages and costs, if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY.
By WALTER HINCHMAN,
President.

Attest—W. W. NEVIN, Secretary.

WM. M. SPACKMAN, [L. S.] 42
[L. S.] J. D. PROBST. [L. S.]

Sealed and delivered and taken and acknowedged this 22d day of August, 1885, before me.

[SEAL.] THEO. H. FRIEND,
Notary Public,
N. Y. City and Co.

UNITED STATES OF AMERICA. } 43
SOUTHERN DISTRICT OF NEW YORK. } *ss:*

William M. Spackman and John D. Probst, the within-named sureties, being severally duly sworn, depose and say, and each for himself, says that he is worth the sum of Ten Thousand Dollars, over and above all his just debts and liabilities.

WM. M. SPACKMAN,
J. D. PROBST. 44

Sworn to this 22nd day of August A. D., 1885, before me.

THEO. H. FRIEND,
Notary Public,
N. Y. City and Co.

Indorsed— "Approved Aug. 22nd, 1885, W. J. Wallace."

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
GUILLAUME REUSENS,
Defendant in Error.

No. 980.

AFFIDAVIT

In Opposition to Motion for Additional Security.

THEODORE F. H. MEYER,
Attorney for Plaintiff in Error,
No. 32 NASSAU STREET,
New York City.

JOS. H. CHOATE,
Of Counsel.

JOHN C. RANKIN, JR., PRINTER 84 CORTLANDT ST. N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY,
Plaintiff in Error,

vs.

GUILLAUME REUSENS,
Defendant in Error.

No. 980.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
Southern District of New York,
City and County of New York. } ss.:

THEODORE F. H. MEYER, having first been duly sworn, says, upon his oath, that he is the attorney for the plaintiff in error in the above entitled cause: that this case was brought to this Court by writ of error to review a judgment rendered by the Circuit Court of the United States, for the Southern District of New York, in an action which had been originally brought in the Supreme Court of the State of New York, for the City and County of New York, by Guillaume Reusens, as plaintiff, against The Mexican National Construction Company, as defendant; that said Reusens is an alien resident in New York, and the Mexican National

4 Construction Company was, and is, a corporation created and existing under the laws of the State of Colorado, and that the said action was commenced February 7th, 1884, by attachment.

That the Mexican National Construction Company thereafter, and on or about the 11th day of February, 1884, in conformity with the provisions of the statutes of the State of New York relating thereto, applied for an order to discharge the attachment as to the whole of the property attached; that upon such application the Mexican National Construction Company gave and filed an undertaking with two sureties; that on the 14th day of February, 1884, the attorneys for said
5 Reusens excepted to the sufficiency of the sureties, and that on the 20th day of February, 1884, deponent, on behalf of said Construction Company, offered in open Court a new undertaking, executed by the Fidelity and Casualty Company as surety; that the said Reusens then and there objected to such new undertaking on the grounds, first, that there should be two sureties, and second, that the undertaking was defective in form, for that the Fidelity Company had executed the same as surety, whereas it was by law authorized to guarantee the performance of its conditions only.

That the Court overruled the first objection and
6 sustained the second, with leave to deponent to remedy the defect.

That thereupon and on or about the 23d day of February, 1884, deponent, on behalf of the said Construction Company, offered another new undertaking, the performance of the condition of which was guaranteed by the Fidelity and Casualty Company, and a copy of which undertaking and guarantee is part of the moving papers as Schedule A; that said Reusens then and there again objected to the last mentioned undertaking and guarantee thereof, on the ground that there should be two sureties; that such objection

was overruled on February 25, 1884; that 7
thereupon the said Fidelity and Casualty Company justified through its president, who being examined on oath on the part of said Reusens produced a statement of the assets and liabilities of said Fidelity Company, and testified that the same was in all respects true and correct, and that such testimony was reduced to writing; that thereafter the Judge who presided at the term of said Court found the surety sufficient, and annexed the statement and examination to such undertaking, and endorsed his approval thereon, as follows: "I hereby approve the within undertaking and guarantee thereof. Dated New York, February 25, 8
1884, C. Donohue, J."; and so endorsed, caused the same to be duly filed.

That thereupon the property attached was released pursuant to the order of the Judge.

That said Reusens did not appeal from the decision of the Court overruling his objection, and accepting or approving the said undertaking and guarantee thereof; nor did the said Reusens thereafter take any steps to obtain a review thereof by appeal or otherwise; that the time to appeal to the General Term of said Court from the ruling and determination of the judge presiding at Special Term had expired, when, on the fifth day of May, 1884, the cause was duly removed to 9
the Circuit Court of the United States for the Southern District of New York, at the instance of the plaintiff in error; that thereafter the said Reusens did not take any steps in the last mentioned Court to obtain either a review of said determination as to the sufficiency of said undertaking and guarantee, or a rehearing of that matter, nor did he apply for further or other security, although the case cited on the brief on behalf of the defendant in error, viz: Nichols *vs.* MacLean, 98 N. Y., 458, was decided on the 10th day of March, 1885, about three months prior to the trial of this cause, and

10 over five months previous to the entry of judgment, and the issuing of the writ of error herein; that the action was tried and verdict rendered on June 4, 1885, and that thereafter deponent prepared and served a proposed bill of exceptions whereto, the defendant in error proposed amendments, and that the bill of exceptions was thereafter settled, on notice and after hearing, and filed on August 1st, 1885; that judgment was entered on the twelfth day of August, 1885, and that on the twenty-second day of August, 1885, the Mexican National Construction Company sued out a writ of error to obtain a review by this Court of said judgment, and on the application therefor, and
11 for a citation, offered the bond for damages and costs, a copy whereof is part of the moving papers as Schedule B; that upon such application, there was read on behalf of the Mexican National Construction Company, an affidavit of deponent, a copy whereof is hereto annexed, marked Exhibit 1. That the Circuit Judge personally took the oaths of the sureties on said last mentioned bond, and examined each of them as to his sufficiency, and after such examination, approved the bond and signed the citation; that since such security was accepted as aforesaid, the circumstances of the case, or of the parties, or of the sureties upon the bond, or of
12 the Fidelity and Casualty Company, have not changed to the knowledge of this deponent so as to in anywise impair the security.

THEODORE F. H. MEYER.

Subscribed and sworn to before me this 10th of April, 1886.

[L. S.] THEO. H. FRIEND,
Notary Public
In and for the City and County of New York.

13

Exhibit 1.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GUILLAUME REUSENS

vs.

THE MEXICAN NATIONAL CONSTRUCTION COMPANY.

14

SOUTHERN DISTRICT OF NEW YORK, *City and County of New York*, } ss. :

THEODORE F. H. MEYER, being duly sworn, says, that he is the attorney for the defendant in this action; that the action was commenced in the Supreme Court of the State of New York in February, 1884; that an attachment was issued in this action against the property of the defendant, which attachment was discharged by an order duly made on the 11th day of February, 1884, upon the defendant giving an undertaking in the sum of twenty-nine thousand dollars that the defendant will on demand pay to the plaintiff the amount of any 15
judgment which may be recovered in the action against the defendant not exceeding the above mentioned sum, with interest, which undertaking was approved by a Justice of the said Supreme Court, from whence the suit was thereafter duly removed to this Court.

That thereafter this case was tried before the Hon. Hoyt H. Wheeler and a jury, and a verdict rendered on the 4th day of June, 1885, for $27,708.05 in favor of the plaintiff and against the defendant, and on the 12th day of August, 1885, judgment was entered on such verdict, with interest